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DEPENDABLE SHEET METAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FAIRMONT SPECIALTY INSURANCE
COMPANY, a Delaware corporation; and
TIG INSURANCE COMPANY, a California
corporation,

Plaintiffs,

v.

INSURANCE CORPORATION OF NEW
YORK, a New York corporation;
DEPENDABLE SHEET METAL, a
California corporation; and DOES 1 through
10,

Defendants.

CASE NO.: C07-03421 VRW

**DECLARATION OF JAYNE LOUGHRY
IN SUPPORT OF DEPENDABLE SHEET
METAL'S MOTION TO REMAND THE
ENTIRE ACTION BACK TO THE
SUPERIOR COURT OF THE STATE OF
CALIFORNIA, CONTRA COSTA
DISTRICT**

**Date: September 6, 2007
Time: 2:00 p.m.
Dept.: Courtroom 6, 17th Floor
Judge: The Hon. Vaughn R. Walker**

I, Jayne Loughry, declare as follows:

1. I am an attorney licensed by the State of California and have and continue to be retained by Dependable Sheet Metal ("Dependable") to serve as personal counsel regarding certain insurance and litigation matters. I am also admitted to practice before the United States District Court for the Northern District of California. I make this declaration in support of Dependable's Motion to Remand the Entire Action Back to the Superior Court of the State of California, Contra Costa District. Unless stated to be upon information and belief, I have personal knowledge of the facts set forth herein, and if called as a witness, am competent to testify to the truth thereof.

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1 2. Dependable is a small sheet metal and heating and air ventilation subcontractor
2 located in Dixon, California. Over at least the past twenty years, it has worked exclusively on
3 residential housing projects in Contra Costa and other counties in Northern California. As is
4 common to developers, contractors, and subcontractors in residential construction, over the
5 years, Dependable has been brought into scores of lawsuits, by complaint or cross-complaint,
6 in which homeowners allege various construction defects. In the past five years, Dependable
7 has been among those sued in some forty different construction defect lawsuits, all of which
8 were brought in California state courts and the majority of which were brought in the Contra
9 Costa County division of the California Superior Court.

10 3. In California, homeowners have a ten-year statute of limitations in which to
11 make claims for construction defects. Accordingly, over the years, Dependable annually
12 purchased liability insurance policies which it understood provided completed operations
13 coverage which would protect Dependable against claims regarding past projects where
14 property damage arising from Dependable's completed work was sustained during the
15 effective dates of the policy. Dependable bought such insurance policies from, among others,
16 Plaintiffs TIG Insurance Company ("TIG"), Ranger Insurance Company (now known as
17 Fairmont Specialty Insurance Company, but herein referred to as "Ranger"), and Co-
18 Defendant, Insurance Corporation of New York ("INSCORP"). Between August 9, 1993 and
19 December 1, 2001, all of Dependable's commercial liability insurance was provided
20 continuously and without gaps or disruption by these three insurers. As such, and because of
21 California's ten-year statute of limitations for residential construction defect claims, the
22 various policies issued by these three insurers have been, and some will continue to be for
23 several more years, Dependable's main, if not sole, protection against past, present, and future
24 construction defect claims for property damage sustained at each construction project.
25 Dependable, by purchasing insurance, did not expect any gap in covered since it never failed
26 to purchase insurance when its policies expired.

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1 4. Over the years, when Dependable became aware of a claim or potential claim, it
2 tendered the claim to all insurers, including TIG, Ranger, and INSCORP. For several years
3 and concerning numerous claims, these insurers routinely accepted tender and provided
4 defense and indemnity to Dependable. Dependable was not made aware of, nor had any
5 knowledge of, how the insurers were allocating responsibility among themselves.

6 5. Within about the past two years, however, INSCORP began what appeared to be
7 routinely denying it had any coverage obligations regarding claims tendered by Dependable.
8 In late 2006, a representative for TIG and Ranger advised Dependable that INSCORP's
9 practice of denying coverage was wrong and would soon cause serious problems for
10 Dependable.

11 6. In January 2007, I was retained by Dependable for the purpose of investigating
12 and assessing Dependable's liability insurance coverage, especially regarding the positions
13 being taken by TIG, Ranger, and INSCORP. Further, I was retained to help Dependable
14 obtain the rights and benefits owed under these various policies – past, present and in the
15 future. In the course of my retention, I have reviewed all of Dependable's liability insurance
16 policies and related documents and correspondence; monitored the status of pending
17 underlying claims; frequently conferred and corresponded with the insurers' various
18 representatives as well as the various counsel assigned to defend Dependable; participated in
19 various proceedings related to certain of the underlying claims; and assisted Dependable in
20 retaining counsel to defend against claims as to which all the insurers have denied coverage.

21 7. I am informed and believe that, at all relevant times, the Riverstone Group
22 ("Riverstone") has served as claims-adjustor for both Plaintiffs TIG and Ranger and were
23 authorized to speak on behalf of both Plaintiffs. On many occasions over the past six months,
24 I spoke and corresponded with Riverstone Claims Adjustor Elizabeth del Rosario and/or her
25 supervisor, Sherrienne Hanavan. I also had an opportunity to meet Ms. del Rosario, as well as
26 plaintiffs' coverage counsel in the instant action, at various Contra Costa County Court and
27 other proceedings concerning various underlying claims. At all times, the individuals named
28 have acted with civility and courteousness. Nevertheless, Dependable in no way considers

1 itself aligned with Plaintiffs. I have repeatedly and continuously advised the representatives
2 of TIG and Ranger that Dependable believes that various positions and actions taken by these
3 two insurers were wrong under the law of California and, further, that some were so wrong as
4 to be considered breaches of the covenant of good faith and fair dealing owed to Dependable.
5 Despite the civility with which all have conducted themselves, the fact that there was and is an
6 adversarial relationship between Defendant Dependable and Plaintiffs TIG and Ranger
7 regarding a number of issues has always been openly acknowledged. Below, I will identify
8 some of the major of these adversarial issues.

9 8. On several occasions, Ms. del Rosario and/or Ms. Hanavan directly, and through
10 assigned defense counsel, asserted that INSCORP was wrongfully refusing to participate in
11 funding settlement of underlying claims, that TIG and/or Ranger refused to pay what it
12 deemed to be INSCORP's rightful share of a settlement amount, and that, therefore,
13 Dependable itself should pay INSCORP's settlement share in order to avoid trial and potential
14 greater harm. I consistently responded that Dependable believed this was an allocation
15 dispute among insurers, that the insurers had other remedies for resolving allocation disputes,
16 that Dependable was not obligated to step into the shoes of a recalcitrant insurer and,
17 moreover, that it was arguably bad faith for one insurer to attempt to make a policyholder pay
18 the settlement share of a recalcitrant insurer. Defendant Dependable and Plaintiffs herein are
19 adverse on this issue.

20 9. Throughout attempts to settle various lawsuits, the representatives of TIG and
21 Ranger consistently asserted that their insurers were at most required to fund only a fraction of
22 any settlement because of when they had determined the completed operations, coverage had
23 commenced for the work performed by Dependable at the subject construction projects. They
24 referred to this determination as their "time on risk analysis" and indicated it was based on the
25 filing of official Notices of Completion ("NOC"). I consistently stated Dependable's contrary
26 views that: 1) while a "time on risk analysis" might be appropriate to determine allocation
27 between or among insurers, it was wholly inappropriate to force a policyholder to pay the
28 settlement share of a recalcitrant insurer; and, furthermore, 2) their method of determination

1 was flawed as applied to Dependable because it commences completed operations coverage at
2 the last possible date whereas, under the policies issued, such coverage commences at the
3 *earliest* of three possible dates including the date upon which Dependable completed work
4 under its contract date, a date earlier than the Notice of Completion. Nevertheless, TIG and
5 Ranger persisted in refusing to pay indemnity or contribute to any settlement in any amount
6 greater than the percentage derived from their NOC determination. Defendant Dependable
7 and Plaintiffs herein are adverse on this issue.

8 10. In one of these lawsuits, *Kaiser, et al. v. KB Homes, et al.*, ("Kaiser"), all other
9 defendants and cross-defendants had settled with plaintiffs, leaving Dependable the only
10 remaining party. After much negotiation, Plaintiffs had reduced their settlement demand
11 against Dependable to slightly less than \$50,000, an amount which defense counsel, assigned
12 by Riverstone, recommended as reasonable. TIG, Ranger, and INSCORP each refused to
13 contribute amounts sufficient to fund a settlement. I attended several proceedings at the
14 Contra Costa County Court aimed at getting the insurers to fund a settlement and, thereby,
15 avoid a trial in which Dependable would be the sole defendant and at risk of greater direct and
16 indirect harm. Nevertheless, the TIG and Ranger representatives persistently refused to pay
17 more than 14% of any settlement amount, asserting that – based on their "time on risk"
18 analysis – the remaining 86% of any settlement should be paid by INSCORP. Despite
19 numerous and strenuous efforts, none of the insurers would budge. On the day which trial was
20 to commence, Dependable recognized that it had only one means of saving itself from trial
21 and the greater harm that would likely be imposed at trial. Reluctantly, Dependable itself
22 agreed to pay the full settlement amount to plaintiffs. At the hearing in which the settlement
23 was recorded, Dependable made clear that it was agreeing to settle solely to avoid the
24 imminent risk of trial which was, in turn, caused solely by the insurers' failure to resolve their
25 allocation dispute in a proper manner and their failure to fund the settlement amount.
26 Dependable also clearly stated that by entering into the settlement with plaintiffs, Dependable
27 was not making a voluntary payment or otherwise breaching any duty of cooperation under its
28 various insurance policies nor was it waiving any rights against its insurers for their failure to

1 settle the *Kaiser* lawsuit. Counsel for TIG, Ranger and INSCORP were all present at this
2 hearing and all consented to the settlement.

3 11. Attached hereto as Exhibit A to this Declaration is a true and correct copy of the
4 April 23, 2007 Reporter's Transcript of the Proceedings concerning the *Kaiser* settlement.

5 12. Attached hereto as Exhibit B to this Declaration is a true and correct copy of the
6 executed Promissory Note by which Dependable settled the *Kaiser* lawsuit.

7 13. Less than two months later, Dependable was again caught in the middle of the
8 insurers' allocation dispute. The lawsuit was entitled, *Edwards, et al. v. Suncrest Homes at*
9 *Dallas Ranch LP, et al.* ("Edwards") and, like *Kaiser*, the lawsuit had been brought in the
10 Contra Costa County Superior Court, all other parties had settled with plaintiffs, and trial was
11 set to commence shortly. In *Edwards*, plaintiffs eventually lowered their settlement demand
12 to just \$20,000, an amount deemed reasonable by defense counsel as well as the expert
13 witness retained by defense counsel. Nevertheless, again TIG, Ranger, and INSCORP all
14 refused to pay amounts sufficient to settle the *Edwards* lawsuit. INSCORP refused to offer
15 any amount and TIG and Ranger refused to pay more than \$150.00 toward settlement. Again,
16 TIG and Ranger asserted that, according to their "time on risk analysis," INSCORP was
17 responsible for paying the remainder of any settlement amount. At my request, defense
18 counsel and Dependable's coverage counsel made numerous but unsuccessful efforts
19 imploring the insurers to remove Dependable from harm's way by settling the *Edwards*
20 lawsuit. By the insurers' failure to respond to these efforts, as well as the conduct and
21 comments of defense counsel retained by Riverstone, I came to believe that the insurers
22 thought that Dependable would, as it had in *Kaiser*, extricate itself from the *Edwards*
23 litigation, despite the fact that I had repeatedly stated to all concerned that Dependable would
24 not again step in to settle lawsuits.

25 14. As such, I believed that Dependable would have no choice but to let the
26 *Edwards* matter proceed to trial, which was scheduled to commence within a week. I then
27 began attempting to learn more about the underlying *Edwards* claims and defense counsel's
28 trial strategy. Defense counsel, assigned by Riverstone, repeatedly assured me that they were

1 prepared for trial, but after extended discussions with counsel and a meeting with the expert
2 witness retained by defense counsel, I became gravely concerned that Dependable's defense
3 was not prepared for trial and that if the case were to go to trial, Dependable would near
4 certainly face an adverse judgment in an amount at least five-fold greater than plaintiffs'
5 settlement demand. At my request, Dependable's coverage counsel communicated my
6 concerns to the representatives and counsel for TIG, Ranger, and INSCORP, essentially
7 begging that they settle the *Edwards* case before the deadline plaintiffs had set for acceptance
8 of their \$20,000 demand. None of the insurers responded in any way.

9 15. As such, believing that it had been effectively abandoned by its insurers and was
10 unprepared for trial, Dependable concluded it had no choice but to attempt to settle the
11 *Edwards* lawsuit itself. I negotiated such a settlement directly with plaintiffs' counsel,
12 whereby Dependable agreed that it would pay plaintiffs \$20,000 on the conditions that none of
13 its insurers objected to the settlement and that the Contra Costa County Court agreed to hold a
14 hearing on the settlement. After such a hearing was scheduled, I wrote to the representatives
15 and counsel of TIG, Ranger, and INSCORP notifying them of the proposed settlement and the
16 scheduled hearing, and further advising them that Dependable had been compelled to enter
17 into the settlement by their egregious conduct and, as such, Dependable was not making a
18 voluntary payment or otherwise breaching any duty of cooperation under its various insurance
19 policies nor was it waiving any rights against its insurers for their failure to settle the *Edwards*
20 lawsuit. (Attached hereto as Exhibit C to this Declaration is a true and correct copy of my
21 letter of June 15, 2007.) A hearing on the settlement was held on June 19, 2007, the day trial
22 was set to commence. Counsel for TIG and Ranger appeared, but despite notification, no one
23 for INSCORP appeared at the hearing. Appearing on behalf of Dependable, I detailed the
24 circumstances and conditions of the settlement for the Court and made clear that Dependable
25 reserved all rights against its insurers, including TIG and Ranger. Counsel for TIG and
26 Ranger consented to the settlement. The Court found that the settlement was reasonable and
27 that there was no objection to it.

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1 16. Attached hereto as Exhibit D to this Declaration is a true and correct copy of the
2 executed Promissory Note by which Dependable settled the *Edwards* lawsuit. (The Reporter's
3 Transcript of these proceedings has been ordered, but not yet received. I will supplement my
4 declaration to include a true and correct copy of the Transcript if it is received before hearing
5 Dependable's Motion to Remand.)

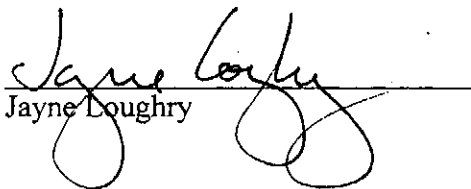
6 17. As to the matters stated in paragraphs 10-15 above, Dependable believes that
7 TIG and Ranger failed to honor their contractual and legal obligations to Dependable and that,
8 as a consequence of TIG and Ranger's conduct, Dependable has been and continues to be
9 harmful. Defendant Dependable and Plaintiffs herein are adverse on these issues.

10 18. Prior to INSCORP's adoption of a routine practice of denying claims against
11 Dependable as to various lawsuits, TIG, Ranger, and INSCORP jointly participated in the
12 defense and indemnification of Dependable in numerous construction defect lawsuits. Neither
13 I nor Dependable have any present knowledge as to the manner or process by which these
14 insurers determined their respective allocations. However, I am informed and believe that,
15 contrary to California law, these insurers charged Dependable multiple and, therefore,
16 excessive deductible payments. I have previously informed Riverstone's Sherrienne Hanavan
17 of Dependable's belief that it was overcharged by TIG and Ranger. Further, in the instant
18 lawsuit, Dependable intends to seek recovery of any and all amounts improperly charged by
19 and paid to the insurers, including TIG and Ranger. Defendant Dependable and Plaintiffs
20 herein are adverse on this issue.

21 19. Most recently in the *Belsky, et al. v. Presley Companies, et al.* ("Belsky")
22 matter, Dependable believes that TIG and Ranger have improperly charged multiple
23 deductibles. The *Belsky* case, like *Kaiser* and *Edwards*, had a Spring 2007 trial date looming
24 in the Contra Costa County Superior Court. As with *Kaiser* and *Edwards*, TIG and Ranger
25 persistently asserted that they were not obligated to fund the full amount of any settlement. In
26 fact, on several occasions, Riverstone's Elizabeth del Rosario and Sherrienne Hanavan told
27 me that, since INSCORP was not willing to participate in funding a *Belsky* settlement,
28 Dependable would have to pay INSCORP's settlement share or, in the alternative, be the only

1 defendant at trial. When I responded that I believed that TIG's and Ranger's remedy was to
2 pursue INSCORP themselves, Ms. Hanavan told me the amount involved was not worth
3 pursuing INSCORP but nevertheless continued to insist that Dependable itself should pay
4 what TIG and Ranger said was INSCORP's share. Eventually, TIG and Ranger decided to
5 settle the *Belsky* lawsuit on their own. I am informed and believed that they did so because I
6 had learned that Riverstone, acting on behalf of TIG and Ranger, had agreed or was thought
7 by the *Belsky* Special Master to have agreed to a \$40,000 settlement demand without the prior
8 knowledge of assigned defense counsel or Dependable. Subsequently, Riverstone has sent an
9 invoice to Dependable seeking payment of deductibles under both the TIG and Ranger
10 policies. (Attached hereto as Exhibit E to this Declaration is a true and correct copy of a June
11 20, 2007 invoice from Riverstone.) Dependable believes such charging of multiple
12 deductibles is improper under California law and intends to pursue its remedies in the instant
13 lawsuit. Defendant Dependable and Plaintiffs herein are adverse on this issue.

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15 Executed on the 25th day of July 2007 in San Francisco, California.

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18 Jayne Loughry
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